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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

ROBERT GENE LOWERY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

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QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is violated by convicting a defendant, in one proceeding, of both first degree robbery, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975, and armed criminal action, § 559.225, RSMo Supp. 1976, where the proof required to establish a violation of the former is necessarily required to prove a violation of the latter?

2. Whether the Missouri Supreme Court is bound by *Brintley* v. *Michigan*, ____ U.S. ____, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), a decision of this Court dismissing an appeal (wherein the same federal constitutional issue was raised) for want of a substantial federal question?

3. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980), *rehearing en banc*, (August 18, 1980), wherein that court held that convicting respondent in a single proceeding of both first degree robbery and armed criminal action violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, conflicts with this Court's decision in *Brintley* v. *Michigan*, ____ U.S. ____, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979); therein this Court dismissed, for want of a substantial federal question, an appeal which sought to review the Michigan Supreme Court's decision holding that the double jeopardy clause of the Fifth Amendment to the United States Constitution was not violated by convicting a defendant in a single proceeding of both armed robbery, § 750.529, M.C.L.A., and possession of a firearm during the commission of a felony, § 750.227(b), M.C.L.A.

4. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980),

rehearing en banc, (August 18, 1980), conflicts with this Court's decision rendered in *Whalen* v. *United States,* ____ U.S. ____, 100 S.Ct. 1432, ____ L.Ed.2d ____ (1980)?

5. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State, supra,* is in accordance with this Court's order of May 27, 1980, vacating judgment and remanding the case to the Missouri Supreme Court for further consideration in light of *Whalen* v. *United States, supra?*

PARTIES

In the Missouri Court of Appeals, Eastern District, the parties were:

Robert Gene Lowery, appellant, and the State of Missouri, respondent.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

ROBERT GENE LOWERY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

PETITION FOR CERTIORARI

Petitioner, State of Missouri, respectfully requests that a writ of certiorari issue to review the judgments of the Missouri Court of Appeals, Eastern District, in this case.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Eastern District, in *State* v. *Lowery,* No. 41834 (Mo.App.E.D. September 2, 1980) is printed in Appendix A. This opinion has not yet been published.

JURISDICTIONAL STATEMENT

In *State* v. *Lowery,* No. 41834 (Mo.App.E.D. September 2, 1980), the Court's opinion was filed on September 2, 1980. The State of Missouri's motion for rehearing and application for transfer was denied on December 12, 1980.

The State's application for transfer filed in the Supreme Court of Missouri was denied on January 13, 1980.

The present petition is filed within sixty days after the entry of final judgment in this case, and this Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sections 560.120, RSMo 1969, 560.135, RSMo Supp. 1975, and 559.225, RSMo Supp. 1976, are set forth in Appendix B. Sections 750.227(b) and 750.529, M.C.L.A., are set forth in Appendix C.

STATEMENT OF THE CASE

This petition is brought as a result of the continuing controversy over the application of federal constitutional double jeopardy principles to the prosecution of criminal defendants in Missouri under the Armed Criminal Action Statute, § 559.225, RSMo Supp. 1976, and in the same trial, for the felony underlying the armed criminal action charge.

The opinion rendered by the Missouri Court of Appeals, relies on *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980); vacated and remanded, 445 U.S. ____ (1980); *decided upon rehearing* 603 S.W.2d 592 (Mo. banc 1980). Although this Court has denied the State of Missouri's petition for writ of certiorari in *Missouri* v. *Sours,* No. 80-571, the State of Missouri still has several petitions for writ of certiorari pending before this Court on this same issue. This petition is being filed so that, if the State of Missouri prevails in any of the pending petitions, it will be able to obtain the vacation of the reversals of the armed criminal action conviction in this case.

The respondent was prosecuted under the armed criminal action statute, § 559.225, RSMo Supp. 1976, and also prosecuted for the underlying felony of robbery first degree, § 560.120, RSMo 1969.

The issue in this petition is identical to that raised in *Missouri* v. *Sours,* No. 80-571, *Missouri* v. *Counselman,* No. 80-754, *Missouri* v. *Greer,* No. 80-997, and *Missouri* v. *Sinclair,* No. 80-1166. The latter three petitions are currently pending in this Court.

THE REASONS FOR GRANTING THE WRIT

Petitioner submits that the writ of certiorari should issue because the opinion below was based entirely on the authority of the Missouri Supreme Court's holding in *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980), *rehearing en banc* 603 S.W.2d 592, which conflicts with recent decisions of this court.[1]

On May 27, 1980, this Court vacated the Missouri Supreme Court's judgment in *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980) (hereinafter referred to as *Sours* I), and remanded the case back for further consideration in light of *Whalen* v. *United States,* ____ U.S. ____, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). The Missouri Supreme Court responded to this Court's directive by rendering an opinion in *Sours* v. *State,* No. 61458 (August 18, 1980) (hereinafter referred to as *Sours* II), wherein the Missouri Supreme Court, after determining unequivocally that the Missouri legislature clearly intended that punishment be imposed for both armed criminal action and its underlying felony, incorporated by reference its analysis on the Fifth Amendment issue made in *Sours* I. See *Sours* II, *slip opinion* at 18.

Although the Missouri Supreme Court was presented with the argument that the combined wisdom of both *Whalen* v. *United States, supra,* and *Brintley* v. *Michigan, supra,* expressed this Court's definitive determination that a defendant can be convicted in one proceeding of two crimes even where the proof required to establish a violation of the first is necessarily required to prove the second,

---

[1]The Missouri Supreme Court's most recent holding in the *Sours* case is identical to original holding made prior to this Court's granting of the State's petition for a Writ of certiorari.

if the legislature so intends, it nevertheless opined as follows:

> The United States Supreme Court has never decided whether imposing separate punishments in a single proceeding both for the offense of committing a felony by means of a dangerous and deadly weapon and for the commission of the felony violates the double jeopardy clause of the federal constitution. The Court expressly declined to rule on this issue in *Simpson* v. *United States,* [citation omitted] C.F. *Whalen* v. *United States* [citation omitted]. Each time a double jeopardy question has been before the United States Supreme Court, it has found it unnecessary to address the constitutional question, because it has been able to find that the legislature did not intend to separately punish the two offenses involved. *Whalen* v. *United States,* [citation omitted]; *Simpson* v. *United States,* [citation omitted], *Iannelli* v. *United States* [citation omitted]. See *Jeffers* v. *United States* [citation omitted]. No United States Supreme Court opinion has considered a statute that contained wording similar to, or identical to, that found in Missouri's Armed Criminal Statute.

Sours II, *slip opinion* at 2.

In discussing *Whalen* v. *United States, supra,* the Missouri Supreme Court stated:

> The Court expressly reserved the question whether, had Congress clearly imposed multiple punishments for the same offense, the imposition would violate the double jeopardy clause. Before holding that the Court would decide the question of statutory interpretation without deferring to the interpretation of the District of Columbia Court of Appeals, the Court carefully distinguished the question of statutory interpretation

> from the constitutional question. . . . Accordingly, since the Court did not reject the petitioner's statutory claim, it did not reach the constitutional issue prosented. [footnote omitted]

Sours II, *slip opinion* at 3.

Before reasserting its position take in *Sours* I, the Missouri Supreme Court determined that, without question, the Missouri General Assembly intended that punishment be imposed for both armed criminal action and its underlying felony. That court went on to say that neither case law nor legislative enactment conflicted with the Missouri General Assembly's unequivocal intent, which appears on the face of the statute (See Appendix B), that punishment be imposed for both crimes. *Sours* II, *slip opinion* at 8-18. The Missouri Supreme Court concluded its legislative intent analysis with the specter of this Court quite apparent: "The unique wording of armed criminal action statute dictates that we must bite the bullet and meet the federal constitutional issue." *Sours* II, *slip opinion* 17-18 [footnote omitted].

With the "bullet" firmly between their teeth, the Missouri Supreme Court proceeded to readopt their original opinion rendered in *Sours I*, but not without, again, the specter of the United States Supreme Court reappearing:

> If the vacation of our prior judgment and the remand of the case for reconsideration in light of *Whalen*, was intended to lead this Court [sic] to adopt the view that the General Assembly is free to impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test, we are unable to so read *Whalen* and we are not prepared to take that step. We believe that the

> United States Supreme Court has heretofore reserved that question as noted above. We believe that such a ruling would abolish the traditional double jeopardy protection against multiple punishments for the same offense. It would require bifurcation of the meaning of 'same offense' under the double jeopardy clause. It would grant to the state legislature the power to define meaning of 'same offense' as used in the double jeopardy clause of the Constitution, a traditional judicial function. The implicit effect of such a holding would be that the double jeopardy clause would hereafter be only a limitation on the executive and judicial branches, but not on the legislative branch of government. We do not believe that it is appropriate for this Court [sic] to make such a ruling. If such a ruling is to be made, it is the responsibility of the United States Supreme Court to make it.

Sours II, *slip opinion* at 22-23.

Petitioner requests that this Court reassert its definitive decisions on this federal constitutional issue for the benefit of the Missouri Supreme Court. It is clear that the Missouri Supreme Court has chosen to disregard recent decisions of this Court which have attempted to elucidate the law of double jeopardy herein raised. In *Brintley* v. *Michigan, supra,* the appellant sought to present the following question to this Court:

> Does double jeopardy clause prohibit separate convictions and sentences for violation of state statute, § 750.227(b), proscribing possession of firearm during commission of felony and for underlying felony (armed robbery in one case and second degree murder in another), where all proofs required to establish violation of underlying felony are necessarily required for

> proof of violation of § 750.227(b) where there is no evidence that weapon has been possessed for any other purpose than commission of underlying felony, where underlying felony is specifically charged as felony element of firearms possession charge, and where (in armed robber case) state has already augmented punishment for armed robberies above punishment imposed for unarmed robberies.

26 Crim.L.Rep. 4113. (§ 750.227(b), M.C.L.A. appears in Appendix D).

Petitioner submits that this Court's summary dismissal in *Brintley* v. *Michigan, supra,* was a disposition on the merits which conflicts with the Missouri Supreme Court's decisions rendered in *Sours I* and *Sours* II. Such a disposition rejects the specific challenges presented in the statement of jurisdiction and leaves, undisturbed, the original judgment appealed from. *Mandel* v. *Bradley,* 432 U.S. 173, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977); *Hicks* v. *Miranda,* 422 U.S. 332, 343-345, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975).

While summary actions by this Court should not be understood as breaking new ground, they should prevent lower courts from coming to contrary conclusions or identical issues. *Mandel* v. *Bradley, supra.* It is clear that the Missouri Supreme Court in *Sours* II has come to a conclusion contrary to that reached by this Court in *Brintley* v. *Michigan, supra.* The Michigan statute, which appears in Appendix C, is remarkably similar to the Missouri armed criminal action statute. The issue summarily dismissed, for want of a substantial federal question in *Brintley,* is precisely the same issue the Missouri Supreme Court found to be dispositive in its reversal of respondent's conviction for armed criminal action in *Sours* I and II.

This Court has manifested its disapproval of state court expansion of federal constitutional rights as evidenced by this Court's opinion rendered in *Oregon* v. *Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975), where it was stated:

> A state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. [citation omitted]. But, of course, a state may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.

Id., 420 U.S. at 719. See also *North Carolina* v. *Butler,* 441 U.S. 369, 99 S.Ct. 1755, 1759, 60 L.Ed.2d 286 (1979).

Petitioner submits that the Missouri Supreme Court misinterpreted this Court's decision rendered in *Whalen* v. *United States, supra.* The Missouri Supreme Court quite clearly disregarded the Court's conclusion, reached in *Whalen,* that:

> In the present case, therefore, if Congress has not authorized cumulative punishment for rape and for an unintentional killing committed in the course of the rape, contrary to what the Court of Appeals believed, the petitioner has been impermissibly sentenced. The *dispositive* question, therefore, is whether Congress did so provide.

Whalen v. *United States,* 100 S.Ct. at 1436. (Emphasis added). It appears that the Missouri Supreme Court misinterpreted the following words of this Court:

> The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal consti-

> tutional framework the legislative power, including the power to define criminal offenses and to proscribe the punishments to be imposed upon those found guilty of them, resides *wholly* with the Congress. If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy but also the Constitutional principle of separation of powers in a manner which trenches particularly harshly on individual liberty.

Whalen v. *United States,* 100 S.Ct. 1436-1437 [Citations and footnote omitted.] [Emphasis added.]

Further evidence of the Missouri Supreme Court's failure to grasp the import of the *Whalen* decision is its inability to recognize dispositive language in the *Whalen* decision. In discussing *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (which this Court found to be incorporated in the District of Columbia Code), the majority in *Whalen* state that:

> We think that the only correct way to read § 23-112, in light of its history and its evident purpose, is to read it as embodying the *Blockburger* rule of construing the penal provisions of the District of Columbia Code. Accordingly, where two statutory offenses are not the same under the *Blockburger* test, the sentences imposed 'shall, unless the court expressly provides otherwise, run consecutively.' [footnote omitted] And where the offenses are the same under that test, the cumulative sentences are not permitted, *unless elsewhere specifically authorized* by Congress.

Whalen v. *United States,* 100 S.Ct. at ____ [Emphasis added.] That the Missouri Supreme Court misapplied the *Blockburger* rule is further evidenced by this Court's recent

opinion in *Illinois* v. *Vitale,* 27 Crim.L.Rep. 3190, wherein the test is characterized as follows:

> In *Brown* v. *Ohio,* 432 U.S. 161 (1977), we stated the principal test for determining whether two offenses are the same for purposes of barring *successive* prosecutions. Quoting from *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932), which in turn relied on *Gavieres* v. *United States,* 220 U.S. 338, 342-343 (1911), we held that
>
> 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'

Illinois v. *Vitale,* supra.

Petitioner submits that a definitive decision by this Court, on this federal constitutional issue is necessary in this case. Diametrically opposed views exist regarding this issue in different jurisdictions, both state and federal. There appears to be conflicting views on this issue between the Missouri Supreme Court and the Eighth Circuit Court of Appeals.

The following cases from other jurisdictions have found that armed robbery and the use of a firearm in the commission of a felony are distinct offenses under the tests set forth in *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), because it was held that the charge of robbery contains elements not necessarily included in the felony firearms offense. *State* v. *Saxon,* 193 Neb. 278, 226 N.W.2d 765 (1975); *Kowalski* v. *Parratt,* 533 F.2d 1071 (8th Cir. 1976), *cert. denied,* 429 U.S. 844 (1976); *Wayne County Prosecutor* v. *Record-*

er's Court Judge, 406 Mich. 374, 280 N.W.2d 793 (1979) (decision of the Michigan Supreme Court giving rise to this Court's decision in *Brintley* v. *Michigan*); *Jones* v. *Commonwealth of Virginia,* 235 S.E.2d 313 (1977); *United States* v. *Hearst,* 412 F.Supp. 877 (N.D.Calif. 1976).

The Missouri Supreme Court recognized but neglected the foregoing authority and chose to follow cases from other jurisdictions which it felt supported its view that the double jeopardy clause prohibits punishing a person twice for the same offense in a single prosecution. *State* v. *Pinder,* 375 So.2d 836, 838 (Fla. 1979); *Tyson* v. *State,* 386 N.E.2d 1185, 1193 (Ind. 1979); *State* v. *Frye,* 283 Md. 709, 393 A.2d 1372, 1375 (1978); *Briggs* v. *State,* 573 S.W.2d 157, 159 (Tenn. 1978).

The dire need for a decision of this Court in regard to this federal constitutional issue is exemplified by recent decisions of certain state supreme courts which conflict in their interpretation of the federal double jeopardy clause. In *Whack* v. *State,* 416 A.2d 265 (Md. 1980), the Court of Appeals of Maryland (highest state court) held that imposition of punishment for both robbery with a dangerous or deadly weapon and the separate crime of use of a handgun in the commission of a felony does not violate the Fifth Amendment prohibition against double jeopardy. Conversely, the Supreme Court of Delaware, in *Hunter* v. *Delaware,* No. 215 (March 15, 1980), held that the double jeopardy clause prevented imposing punishment for both assault in the first degree and the separate crime of possession of a deadly weapon during the commission of a felony.

An immediate decision on this federal constitutional issue is necessary; even the Missouri Supreme Court so stated in *Sours* II: "Following the original *Sours* opinion our prosecutors and penal authorities indicated informally to this Court [sic] that they believed that as many as four-

hundred to six-hundred prior convictions might be affected by the opinion." *Sours* II, *slip opinion* at 12.

Every jurisdiction in this country is anxiously awaiting a definitive decision by this Court in this case because the facts and federal constitutional issue here present an excellent opportunity for this Court's review; this is especially true since the legislative intent issue has been determined and no further state grounds remain in the case. Finally, a decision is necessary because there exist decisions of this Court conflicting with the Missouri Supreme Court's decision in *Sours* II. Therefore, it is respectfully requested that this Court issue the writs and resolve the bewilderment regarding double jeopardy not only in the State of Missouri, but in every jurisdiction within this country.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION THREE

STATE OF MISSOURI, *Respondent,* vs. ROBERT GENE LOWERY, *Appellant.*	**No. 41834**

Appeal from the Circuit Court of St. Louis City.

Hon. Michael F. Godfrey, Judge.

OPINION FILED: September 2, 1980.

Defendant was convicted by a jury of first degree robbery and armed criminal action pursuant to § 560.120, RSMo. 1969, § 560.135, RSMo.Supp. 1975 and § 559.225, RSMo.Supp. 1976. Defendant was sentenced consecutively under the Second Offender Act to twenty-five years for first degree robbery and twenty years for armed criminal action. Defendant appeals. We reverse in part.

On July 28, 1978, during the early evening hours, defendant and an accomplice entered Buncher's Pharmacy,

St. Louis, Missouri, and asked the price of a tube of toothpaste. Immediately thereafter, defendant directed the owner at gunpoint to the rear of the pharmacy. Defendant took approximately $800.00 in cash and $250.00 in drugs.

Defendant charges that the trial court erred in sentencing him to twenty years for armed criminal action by reason of § 546.490, RSMo. 1969. We agree that the trial court erred, but for a different reason than that espoused by defendant.

Although double jeopardy was not mentioned by defendant in his appeal, reference is made to the United States Supreme Court's disposition of Sours v. State, 593 S.W.2d 208 (Mo.banc 1980). By authority of Whalen v. United States, 445 U.S. ____, 100 S.Ct. 1432 (1980), the Supreme Court ordered *Sours* vacated and reconsidered. Missouri v. Sours, No. 79-1565 (S.Ct., filed May 27, 1980). Our Missouri Supreme Court reconsidered *Sours* pursuant to the United States Supreme Court's mandate.

By reason of the last mandate of our Missouri Supreme Court, Sours v. State, No. 61458 (Mo.banc—August 18, 1980), the twenty year sentence for the armed criminal action cannot stand.

That part of the judgment of the circuit court imposing a twenty year sentence on defendant for armed criminal action is reversed. That part of the judgment of the circuit court imposing a twenty-five year sentence on defendant for first degree robbery is affirmed.

ROBERT E. CRIST, Judge.

Robert G. Dowd, Presiding Judge, Concurs

James R. Reinhard, Judge, Concurs

Supreme Court No. 62710

IN THE

SUPREME COURT OF MISSOURI

EASTERN DISTRICT NO. 41834

January Session 1981

State of Missouri, Respondent,

vs. TRANSFER

Robert Lowery, Appellant.

Now at this day, on consideration of RESPONDENT'S Application to transfer the above entitled cause from the EASTERN DISTRICT Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1981, and on the 13th day of January 1981, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 13th day of January 1981.

Thomas Simon, Clerk

Anne Berhorst, D.C.

APPENDIX B

Section 560.120, RSMo 1969, reads as follows:

560.120. Robbery in first degree.—Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

Section 560.135, RSMo 1975 Supp., reads as follows:

560.135. Armed robbery, punishment for.—Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years; every person convicted of robbery in the second degree shall be punished by imprisonment by the division of corrections not exceeding five nor less than three years; every person convicted of robbery in the third degree shall be punished by imprisonment by the division of corrections not exceeding five years.

Section 559.225, RSMo 1976 Supp., reads as follows:

559.225. Armed criminal action—penalty—exceptions. —1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of

armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee [sic] by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

APPENDIX C

Section 750.529, M.C.L.A., reads as follows:

750.529. Armed robbery; aggravated assault—Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison. As amended P.A. 1959, No. 71, § 1, Eff. March 19, 1960.

Michigan Compiled Laws Annotated, 750.227b, reads as follows:

Michigan Compiled Laws Annotated, 750.227b. *Possession at time of commission or attempted commission of felony; additional sentence, punishment*—

"Sec. 227b (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony except the violation of section 227 or section 227a[1], is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

"(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the

felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

"(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term, imposed pursuant to subsection (1). P.A. 1931, No. 328, § 227b, added to P.A. 1976. No. 6, § 1, Eff. Jan. 1, 1977." [Footnote omitted.]

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

STATE OF MISSOURI,)
)
Plaintiff,)
)
vs.) Cause No. 80-1561
)
ROBERT GENE LOWERY,)
)
Defendant.)

AFFIDAVIT AND MOTION FOR LEAVE TO PROCEED IN FORMA PAUPEROUS

Comes now Lawrence O. Willbrand, Attorney for Defendant, Robert Gene Lowery, and upon first being duly sworn on his oath states that to the best of his knowledge and belief defendant has been confined in the penetentiary for over the last year and no doubt has no access to funds to employ an attorney or prosecute any legal matter and,

For the last year the undersigned has been a court appointed attorney as the result of the State decision and judicial determination that said defendant is completely without funds or assets and is for practical purposes a complete pauper.

Therefore, defendant moves for leave to proceed in this court in forma pauperous as he has been proceeding in State Court as aforesaid.

WHEREFORE, defendant prays accordingly and further affiant sayeth not.

Lawrence O. Willbrand
LAWRENCE O. WILLBRAND
Attorney for Defendant
818 Olive Street, Suite 873
St. Louis, Missouri 63101
436-7715

Subscribed and sworn to before me this 13 day of May, 1981.

My term expires:
8/20/84

Nancy E. DeWeese
NOTARY PUBLIC

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SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI, Plaintiff,	)	
vs.	)	Cause No. 80-1561
ROBERT GENE LOWERY, Defendant.	)	

DEFENDANT'S OPPOSITION BRIEF

The Supreme Court of Missouri En Banc held in Sours v. State of Missouri, 630 S.W.2d 592, and 593 S.W.2d 208, that the double jeopardy clause of the fifth amendment to the U.S. Constitution prohibits the state from punishing a person twice for the same offense, citing Benton v. Maryland, 395 U.S. 784.

In applying the "same evidence" test the court observed that proof of robbery requires the same proof as armed criminal action both of which this defendant was convicted.

Application of the "same evidence" test is supported by the U.S. Supreme Court in Illinois v. Vitale, _____U.S._____, 100 S. Ct. 2260, 65 L.Ed 2d 228 (1980), in which the latter court prohibits imposing multiple punishment for the same offense.

The armed criminal elements would constitute a lesser included offense.

The legislature of a State may not impose on the judiciary acts which violate judicial concepts of administration of justice pursuant to our Constitutions which are deemed violative of the latter.

It is quite clear that the statute in question was not a mere punishment-enhancement statute designed to amend the armed robbery statute because the Missouri Constitution prohibits an amendment without setting forth in full the statute to be amended hence armed criminal action is intended to be a separate crime.

Obviously the legislature sets out prescribed ranges of punishments for certain offenses and it would be contrary to justice, fair play and our Constitutions, for the courts to

assess duplicious punishments for the same act.

The same act which violates the one statute also violates the other.

One who theoreticaly reads the one statute is led to believe that the crime and punishment is set out but one would be greviously misled unless the doctrine of double jeopardy were not applied.

In the instant case the defendant suffered a sentence of twenty-five years for the armed robbery and another twenty years because he was armed when he committed the armed robbery, to run consecutively.

The issue is important whether we are dealing with form rather than substance. But if the form misleads and results in duplication of punishments, it becomes a substantive matter involving twenty years of human life.

Why is it necessary to provide punishment for the act in two separate legislative enactments. Why not six separate punishment statutes which would allow the prosecuting authority to hold three or four of them as a weapon to threaten the defense?

One of those threats would be the shadow of possibly six trials for the same act which would give the prosecutor six bites at the same apple.

It it can be done twice there is no limit.

Under the Missouri Constitution the instant statute cannot be a punishment-enhancement device and if allowed to stand in the face of double jeopardy, a weapon which threatens our Constitutional form of punishment will be given nurture and life.

WHEREFORE, the application for certiorari must be denied.

Respectfully submitted,

LAWRENCE O. WILLBRAND
Attorney for Defendant
818 Olive Street, Suite 873
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436-7715